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In The

# Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, *et al.*,

*Appellants,*

*vs.*

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,

*Appellees.*

*On Appeal from the United States Court of Appeals for the Third Circuit*

No. 84-1379 (5)

DIAMOND, *et al.*

*Appellants,*

*vs.*

CHARLES, *et al.*

*Appellees.*

*On Appeal from the United States Court of Appeals for the Seventh Circuit*

## BRIEF AMICUS CURIAE OF U.S. SEN. GORDON J. HUMPHREY (R-N.H.), U.S. SEN. ORRIN G. HATCH (R-UTAH), U.S. REP. CHRISTOPHER H. SMITH (R-N.J.), U.S. REP. ALAN B. MULLOHAN (D-W.VA.) AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES IN SUPPORT OF APPELLANTS

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## INTEREST OF THE AMICI CURIAE

The amici curiae consist of 82 members of the Congress of the United States, of which are the members of the Senate and members of the House of Representatives, as follows:

Sen. James Abdnor (R-S.Dak.), Rep. Richard K. Armey (R-Tex.), Rep. Robert E. Badham (R-Cal.), Rep. Steve Bartlett (R-Tex.), Rep. Joe Barton (R-Tex.), Rep. Herbert H. Bateman (R-Va.), Rep. Thomas J. Bliley, Jr. (R-Va.), Rep. David E. Bonior (D-Mich.), Rep. Robert A. Borski (D-Pa.), Rep. Beau Boulter (R-Tex.), Rep. Dan Burton (R-Ind.), Rep. William Carney (R-N.Y.), Rep. William W. Cobey, Jr. (R-N.C.), Rep. E. Thomas Coleman (R-Mo.), Rep. Larry E. Craig (R-Idaho), Rep. Phillip M. Crane (R-Ill.), Rep. William E. Dannemeyer (R-Cal.), Rep. Hal Daub (R-Nebr.), Rep. Robert W. Davis (R-Mich.), Rep. Thomas D. DeLay (R-Tex.), Sen. Jeremiah Denton (R-Ala.), Rep. Michael DeWine (R-Ohio), Rep. Robert K. Dornan (R-Calif.), Sen. Dave Durenberger (R-Minn.), Rep. Bill Emerson (R-Mo.), Rep. Jack Fields (R-Tex.), Sen. Phil Gramm (R-Tex.), Sen. Charles Grassley (R-Iowa), Rep. Kenneth J. Gray (D-Ill.), Rep. James V. Hansen (R-Utah), Rep. Thomas F. Hartnett (R-S.C.), Sen. Orrin G. Hatch (R-Utah), Sen. Mark O. Hatfield (R-Oreg.), Rep. Paul B. Henry (R-Mich.). Sen. Gordon J. Humphrey (R-N.H.), Rep. Duncan Hunter (R-Calif.), Rep. Earl Hutto (D-Fla.), Rep. Henry J. Hyde (R-Ill.), Sen. Bob Kasten (R-Wis.), Rep. Jack F. Kemp (R-N.Y.), Rep. Thomas N. Kindness (R-Ohio), Rep. John J. LaFalce (D-N.Y.), Rep. Robert J. Lagomarsino (R-Calif.), Rep. Norman F. Lent (R-N.Y.), Rep. William O. Lipinski (D-Ill.), Rep. Bob Livingston (R-La.), Rep. Tom Loeffler (R-Tex.), Rep. Thomas A. Luken (D-Ohio), Rep. Edward R. Madigan (R-Ill.), Rep. Thomas J. Manton (R-N.Y.), Rep. Nicholas Mavroules (D-Mass.), Rep. Romano L. Mazzoli (D-Ky.), Sen. James A. McClure (R-Idaho), Rep. Clarence E. Miller (R-Ohio), Rep. Alan B. Mollohan (D-W.Va.), Rep. Carlos J. Moorhead (R-Calif.), Rep. Austin J.

Murphy (D-Pa.), Sen. Don Nickles (R-Okla.), Rep. James L. Oberstar (D-Minn.), Rep. Ron Packard (R-Calif.), Rep. Timothy J. Penny (D-Minn.), Rep. Thomas E. Petri (R-Wis.), Rep. Jim Saxton (R-N.J.), Rep. F. James Sensenbrenner, Jr. (R-Wis.), Rep. Norman D. Shumway (R-Calif.), Rep. Mark D. Siljander (R-Mich.), Rep. Ike Skelton (D-Mo.), Rep. Christopher H. Smith (R-N.J.), Rep. Denny Smith (R-Oreg.), Rep. Robert C. Smith (R-N.H.), Rep. Harley O. Staggers, Jr. (D-W.Va.), Rep. Arlan Stangeland (R-Minn.), Rep. Charles W. Stenholm (D-Tex.), Rep. Patrick L. Swindall (R-Ga.), Sen. Steven D. Symms (R-Idaho), Rep. Thomas J. Tauke (R-Iowa), Sen. Strom Thurmond (R-S.C.), Rep. Harold L. Volkmer (D-Mo.), Rep. Barbara F. Vucanovich (R-Nev.), Rep. Vin Weber (R-Minn.), Rep. Frank R. Wolf (R-Va.), Rep. Robert A. Young (D-Mo.)

The amici curiae, as Members of the Congress of the United States, are vested by Article II, Section I, of the Constitution, with all legislative power granted in the Constitution. It is their sworn duty and common purpose "to support and defend" the Constitution of the United States.

Under the Constitution, each coordinate branch of the federal government has a duty to insure that the federal government, through each of its branches, maintains and respects the limits on their powers as prescribed by the Constitution. When one branch of the federal government exceeds its proper authority, it is the duty of the other coordinate branches to take measures that are reasonable and prudent to correct this imbalance. Members of Congress share with the other coordinate branches an interest in maintaining this constitutional balance.

The unique interest of the amici curiae in the preservation of these essential principles of the American Constitution is not represented by other parties in this case. Counsel for all parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The Supreme Court, in *Roe v. Wade*, 410 U.S. 113 (1973), based its decision on selective and disputable historical data. The Court did not acknowledge the prevailing cultural, legal and medical abhorrence of abortion since recorded history, up to *Roe*. It is the intent of the amici curiae, herein, to supplement the facts, correct the inaccuracies and challenge the interpretation of the historical circumstances in which *Roe* and its progeny have emanated. It is the position of the amici curiae that this Court cannot fully and fairly address the substantive issues in the two cases at bar with the jurisprudential wisdom required of this nation's highest Court without reviewing the premises and rationale of *Roe*.

It is the contention of the amici curiae that the Court exceeded its judicial authority in its finding of a previously unrecognized constitutional right to abortion. Furthermore, the amici curiae respectfully submit that the framers of the U.S. Constitution and of the Fourteenth Amendment did not intend to create a right to abortion. While fully deferring to the Supreme Court's authority to interpret laws, it is the view of the amici curiae that there was insufficient basis for the Court's conclusion in *Roe* that prenatal life was or is beyond the power of the States to protect. Therefore, this honorable Court should uphold the state laws invalidated by the courts below as appropriate exercises of state power to serve its compelling interest to protect prenatal life through legislation and regulation.

## ARGUMENT

### I.

### THE SUPREME COURT'S DECISION IN *ROE V. WADE* IS IN OPPOSITION TO THE HISTORICAL TREATMENT OF ABORTION AT COMMON LAW AND BY EARLY AMERICAN ABORTION LAWS.

The Court's sweeping decision in *Roe v. Wade*, 410 U.S. 113 (1973), which resulted in abortion-on-demand, clearly conflicts with the treatment of abortion at common law, early American abortion laws, and by laws enacted by the state legislatures at the time of the decision. Virtually every historical, medical and legal argument the Court utilized in support of *Roe* has been subjected to intense scholarly criticism.

After reviewing the development of abortion as a crime at common law and relying heavily on the analysis of Professor Cyril H. Means, an advocate of legalized abortion, the Majority in *Roe* concluded.:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.

*Roe*, 410 U.S. at 140.

The Court's conclusions and its acceptance of the common law analysis of Professor Means was clearly contrary to the actual

treatment of abortion at common law, with respect not only to maternal health, but also to the protection of the life of the fetus.

When Justice Blackmun delivered the Court's opinion on January 22, 1973, not a single abortion statute in any State of the Union stood. Even the State of New York, which had one of the most unrestrictive abortion statutes and which allowed abortion on demand through the 24th week of pregnancy,[1] was too restrictive of the abortion right for a majority of the Court.

On the same day that *Roe* was decided, the Court also handed down the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973). The Court stressed in *Roe*, "[t]hat opinion and this one, of course are to be read together." *Roe*, 410 U.S. at 165. In *Doe*, the Court, making reference to its earlier decision in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971), construed the meaning of "mother's life or health":

> That . . . has been construed to bear upon psychological as well as physical well-being . . . . [T]he medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health.

As a result of these two abortion decisions and their progeny, no State may constitutionally prohibit abortion at any time during pregnancy. After the end of the first trimester (first three months), it may promulgate regulations to protect *maternal* health, but not to impede abortion. After viability, the State may "proscribe" abortion only when the woman considering abortion can find no

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1. N.Y. Penal Law, Section 125.05(3) (1977).

physician willing to verify that her mental health would, for example, be "taxed by child care" or suffer "distress . . . associated with the unwanted child." *Roe,* 410 U.S. at 153. In effect, therefore, as then Yale Law School Professor John Hart Ely has written, "[T]he statutes of most states must be unconstitutional *even as applied to the final trimester* . . . . [E]ven after viability the mother's life *or health* (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience . . .) must, as a matter of constitutional law, take precedence over . . . the fetus's life . . . ."[2]

In effect, provided a woman can find a physician willing to perform an abortion, she has a constitutional right to obtain one at any time throughout the nine months of pregnancy, right up to birth.

When the Court finished its recitation of the history of the case and disposed of the procedural questions of justiciability, standing and abstention, it did not approach the substantive issues first. Instead, the Court initiated a lengthy examination of the history of legal and societal attitudes toward abortion. Nearly twice as many pages were devoted to this effort as were to be spent on analysis of the legal issues.

The Court opined that because abortion was fairly freely available and not forbidden by the law until the mid-19th century, it should be recognized as a facet of the liberty the framers of the Fourteenth Amendment intended to protect. This historical discussion, then, must be seen as the foundation for the Court's

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2. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 921 n.19 (emphasis in original) (1973).

holding that the right of privacy found in the U.S. Constitution should encompass abortion.[3]

The Court's recounting of the history of abortion began with ancient attitudes and the Hippocratic Oath. Relying for both sections on the outdated work (1943) and strong views of historian Ludwig Edelstein, the Court surmised that the ancient Greeks and Romans had resorted to abortion with great frequency and that it had met with widespread approval. *Roe*, 410 U.S. at 130. Comprehensive new evidence assembled by the Italian historian Enzo Nardi published in 1971, reveals that temple inscriptions and other ancient writings disclose considerable opposition to abortion in the Greco-Roman world.[4] This evidence has considerable support from other commentators. A comprehensive survey by Stephen Krason and William Hollberg[5] casts skepticism on the Court's interpretation of Plato and Aristotle as unqualifiedly "commending" abortion, cites a number of

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3. Some have found even the Court's version of abortion history to point in the opposite direction from that holding. "The Court . . . seemed to ignore 'the "traditions and collective conscience of our people," ' " wrote one commentator. "[T]he Court's holding was decidedly more lenient than the American attitudes indicated by the legislative trends and professional opinions discussed in the course of its opinion." Comment, *Roe v. Wade and In Re Quinlan: Invididual Decisions and the Scope of Privacy's Constitutional Guarantees*, 12 U.S.F.L. Rev. 111, 142 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 493 [1965], quoting *Powell v. Alabama*, 287 U.S. 45, 67 [1932]). See also Regan, *Rewriting Roe v. Wade*, 77 U. Mich. L. Rev. 1569, 1621 (1979), ("[T]he Court has rarely overturned as much history all at once as it did in *Roe v. Wade*. That surely ought to give us pause.").

4. Nardi, *Procurato Aborto Neo Mondo Greco Romano*, (1971).

5. S. Krasson & W. Hollberg, *The Law and History of Abortion: The Supreme Court Refuted*, 4-7 (1984). But see Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L.J. 67, 77.

prominent Greeks and Romans who condemned abortion,[6] and points out that according to a text ascribed to Galen, Sparta under Lycurgus and Athens under Solon prohibited abortion.[7] Harold Brown and Krason and Hollberg observe that Roman law banned abortion beginning with the reign of the Emperor Augustus.[8]

Except for their observation that the Persian Empire banned abortion, the Court's survey of the ancient world was limited to Greece and Rome. *Roe,* 410 U.S. at 130. Yet surely it is noteworthy that abortion was condemned by the twelfth century B.C.E. (Before Common Era) Assyrians,[9] by the Hittites,[10] by the early Hindus[11] and Buddhists of India and by Indian law. There is some indication that the ancient Egyptians held similar views.[12] Most of these facts were available to the *Roe* Court in the epical work of Eugene Quay.[13] The Court knew of Quay, for the opinion cited

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6. Krasson & Hollberg, *supra*, note 5, at 4, 8. See also Special Project, *supra* note 7, at 81-82.

7. *Id.* at 8, following Brown, *What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion*, Hum. L. Rev., Spring 1975, at 5, 11.

8. Brown, *supra*, note 7, at 14: Krasson and Hollberg, *supra*, note 5, at 8.

9. Brown, *supra*, note 7 at 7: Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5, at 75.

10. Brown, *supra*, note 7, at 8; Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5, at 74 and n. 6.

11. Krasson and Hollberg, *supra*, note 5, at 2; Special Project, *supra*, note 5 at 74 and n. 8.

12. *Id.*; Special Project, *supra*, note 5, at 73-74 and nn. 3-4.

13. Quay, *Justifiable Abortion - Medical and Legal Foundation* (Pt. 2), 49 Geo. L.J. 395 (1961).

him, *Roe*, 410 U.S. 130, n.9., but the Court incorporated none of this historical evidence into its opinion.

The Court itself recognized that the Oath of Hippocrates, composed in ancient Greece, prohibited members of what would become the medical profession to practice abortion. This Hippocratic Oath, until recently, was recited by the graduates of nearly every medical school as they formally became physicians. The Court raised this matter *sua sponte,* because, it wrote, "Although the Oath is not mentioned in any of the principal briefs in this case or in [the companion case of] *Doe v. Bolton* . . . , it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day." *Roe*, 410 U.S. at 131.

The Court did not fill in the gap between ancient attitudes and the Hippocratic Oath up to the Anglo-American common law. During this period, the ethics and law of Western civilization were dominated by the Judeo-Christian perspective, both of which had long opposed abortion, with minor exceptions. The first century C.E. (Common Era) Didache, known as the "Teaching of the Twelve Apostles," proclaimed to the early Christian Church, "You shall not slay the child by abortions. You shall not kill what is generated."[14] Similar declarations were made in other early Christian writings, such as the Epistle of Barnabus and the Apocalypse of Peter.[15] In the West, the Fathers of the Church, from second century Clement of Alexandria, through Tertullian and Jerome to Augustine, denounced abortion.[16] In the East, St. John Chrysostom and St. Basil of Cappadocia spoke out against

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14. J. Noonan, *An Almost Absolute Value in History*, in *The Morality of Abortion: Legal and Historical Perspective* 1, 9 (J. Noonan ed. 1970).

15. *Id.* at 10.

16. *Id.* at 11-16.

abortion.[17] These early teachings were finalized in the prohibitions of penitentials and of canons enacted by synods and councils, which in turn surfaced into the law of the state, such as the Frankish kingdom of Charlemagne.[18] A canon law decretal of Gregory IX coupled the penalty for abortion with that for means of sterilization: of both it was said, "[L]et it be held as homicide."[19] This treatment of abortion, together with contraception, as crimes demanding severe punishment was combined with a general view that abortion, although punished as such, was not "true" homicide until the fetus was "ensouled," which was believed to occur at formation or quickening.[20] That distinction, taken from Aristotle, was introduced by theologians in the fifth century,[21] and was the prevailing view until the seventeenth century. Aristotle's theory, which came to be called "delayed animation," was essentially one of biological metamorphasis.

In the early 13th century, Henry De Bracton wrote that abortion by blow or poison was homicide if the fetus was "already formed and animated, and particularly if it be animated."[22] Another authority later in that century, Fleta, also condemned

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17. *Id.* at 17.

18. *Id.* at 18.

19. *Decretals* 5.12.5, quoted in Noonan, *supra*, note 14, at 21.

20. For a careful and comprehensive history of the attitude of medieval Christendom toward abortion, see J. Connery, *Abortion: The Development of the Roman Catholic Perspective* (1977).

21. Special Project, *supra*, note 5, at 84.

22. 2 H. Bracton, *De Legibus et Consuetudinibus Angliae* 279 (T. Twiss ed. 1879).

abortion of a "formed and animated" fetus as homicide.[23] At that time, biologists taught that a new life came into being when the fetus assumed recognizable human form, which was thought to occur forty days after conception.[24]

The impossibility of proving the cause of the unborn child's death was a difficulty encountered with the common law crime of abortion. This evidentiary problem led to a paucity of indictments for abortion. As a result, some sixteenth century writers concluded that, as a practical matter, abortion was not a crime.[25] Seventeenth century abortion reformers tried to resolve the proof problem by declaring that an abortion was murder if the child was born alive with marks of the abortion and then died. If the child was stillborn, there was no murder because it could not be known "whether the child was living at the time of the batterie or not, or if the batterie was the cause of the death . . .*R. v. Sims,* 75 Eng.Rep.1075 (K.B.1601). Chief Justice Sir Edward Coke, the great sixteenth and seventeenth century jurist who successfully fought to capture for common law courts most of the jurisdiction of ecclesiastical courts, attempted, later in the 17th century, to resolve the problem further, and, in so doing, indicated once again the concern common law attached to the life of the fetus:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body,

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23. See Quay, *supra*, note 13, 431.

24. See Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1644-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 411-12 (1968).

25. See Davies, *Child Killing in English Law*, 1 Modern L. Rev. 203 (1937).

> and she is delivered of a dead childe this is a great misprision, and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, in *rerum nature,* when it is born alive.[26]

In *Roe*, the Court, relying on Professor Means' interpretation of two cases from 1327 and 1348 (three centuries before Coke's writings), suggested that Coke was either mistaken or intentionally misstated the status of abortion as a common law crime. *Roe*, 410 U.S. at 134. Other commentators, such as Robert Byrn[27], Joseph Dellapenna[28] and Robert Destro[29], strongly dispute Means' analysis of those cases and suggest that the cases stand for the opposite conclusion. The great common law scholars clearly indicated that abortion was a crime with respect, at the very least, to a quick fetus.

Finally, as Blackstone indicated, the common law recognized the life of the fetus at the time of quickening. Yet Means, and consequently, the *Roe* Court, dismissed Blackstone, whose name was synonymous with "law" for eighteenth and nineteenth century American lawyers, as an uncritical follower of Coke. Blackstone's work, which must have been familiar to framers both of the

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26. E. Coke, *Institutes III**50 (1644).

27. Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807, 815-27 (1973).

28. Joseph Dellapenna, *The History of Abortion: Technology, Morality, and the Law*, 40 U. Pitt. L. Rev. 359 (1979).

29. Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975).

Constitution and of the Fourteenth Amendment, called it a "great misprision" "[t]o kill a child in its mother's womb."[30]

From treatment of the common law, the *Roe* Court moved to a description of the nineteenth-century statutory enactments on abortion, both in England and in the United States.

The first English abortion statute, recognizing this understanding of human generation, provided for greater penalties for an abortion of a woman "quick with child" than a woman "not being, or not being proved to be, quick with child."[31] These provisions were superseded in a new statute, enacted in 1837, which imposed a penalty for all abortion acts without distinction.[32] A possible motive for this change was the discovery of the ovum, and thus a more accurate idea of the nature of conception, in 1827.

The abortion law in effect in this country, in most states, until the mid-19th century, was derived from English common law. *Roe*, 410 U.S. at 138. While the vast majority of states retained the common law distinction that abortion before quickening was not a crime, no state recognized non-criminal abortion after quickening.[33] Later in the 19th century, several states interpreted the common law to mean that abortion was a crime if it occurred at any time during pregnancy, e.g., *Mills v. Commonwealth*, 13 Pa. 630 (1850).

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30. 4 W. Blackstone, *Commentaries* *198.

31. 43 Geo. 3, c. 58, Section 2 (1803).

32. 7 Will. 4 & 1 Vict., c. 85 (1837).

33. Byrn, *supra*, note 27.

Almost all of the states enacted abortion statutes during the 19th century.[34] Connecticut adopted the first state abortion statute in 1821.[35] The Connecticut statute retained the quickening distinction for the abortion crime. Quickening, however, soon began to disappear as the practical standard to determine criminality. The intention behind enactment of these statutes is illustrated by the Maine Supreme Court which, in interpreting the Maine statute, abrogated the quickening requirement in the abortion crime. The court pointed out that if the pleading did not allege the destruction of the child, it would be fatally defective for not charging the essential element of the crime. *State v. Smith,* 33 Me.48 (1851).

The *Roe* Court insisted that when the application of criminal law was statutorily pushed back to the moment of conception in the nineteenth century, it was done not to protect prenatal life but to protect maternal health against the danger of unsafe operations. *Roe*, 410 U.S. at 151-152. In doing so, it completely failed to mention the important scientific developments that promoted the statutory changes. Although sperm was discovered in 1677, the mammalian egg was not identified until 1827. During the next several decades, the cell was recognized as the structural unit of living organisms and the egg, along with sperm, was determined to be cells. It was these breakthroughs in biological research that persuaded the medical community, and the lawmakers and public who relied on their findings, that the human

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34. See *Roe v. Wade*, 410 U.S. 113, 175-76, nn. 1 and 2 (1973) (J. Rehnquist dissenting).

35. Conn. Stat. Tit. 20, Section 14 (1821).

development concepts embodied in their laws were outmoded and hence, in need of major revisions.[36]

About 1857, a "physicians' crusade" was led by the American Medical Association to enact laws protecting the unborn from the moment of conception.[37] In 1859, the American Medical Association Committee on Criminal Abortion criticized the quickening distinction in criminal abortion laws for the "grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being," and called upon state legislatures to revise their abortion laws.[38] The AMA position was not unnoticed because during this period many states abolished the requirement that an abortion had to follow quickening to be a crime. At the time of the ratification of the Fourteenth Amendment in 1868, at least 28 of the 37 states had made abortions before quickening a crime.[39] In the next 15 years, seven more of these States criminalized pre-quickening abortional acts.

The *Roe* Court omitted these developments — an extraordinary exclusion in light of its quotation, in *Roe*, of

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36. The Human Life Bill: Hearing on S. 158 Befoe the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 474 (comm. print 1981) (statement of Victor Rosenblum, Professor of Law, Northwestern Univ): see also Dellapenna, *supra*, note 28, 402-404.

37. J. Mohr, *Abortion in American, The Origins and Evolution of National Policy, 1800-1900*, at 200 (1978).

38. 12 *Transactions of the Am. Med. Assn.* 73-78 (1859).

39. Quay, *supra*, note 13 at 447-520. See *Gray v. State*, 77 Tex. Cr. R. 221, 224, 178 S.W. 337, (1915) (construing abortion statute to abrogate the common-law quickening distinction).

statements from the principal resolutions of the AMA during the "physicians' crusade." *Roe*, 410 U.S. at 141-42.

Further evidence that at least one motivation behind these laws was the protection of the life of the fetus, is seen in several court decisions interpreting these statutes. For instance, an Oklahoma case held that its anti-abortion statutes were enacted and designed for the protection of the unborn child and through it, society. *Bowlan v. Lunsford*, 76 Okla. 115 (1936).

Between 1967 and 1972, most of the state legislatures considered revising their abortion laws. Nineteen states made changes in their abortion laws to permit abortion in an effort to prevent serious health damage to the mother.[40] In addition, some of the states permitted abortion when the unborn child was conceived as a result of rape or incest, or where the child would be born with substantial deformity. Four states required no grounds at all. But all states limited abortions in terms of age of the fetus. For example, Washington had a limit of four lunar months.

The other thirty-one states did not change their abortion law, despite the fact that abortion legislation was introduced in most of them. In two states, Michigan and North Dakota, proposed liberalized abortion statutes were rejected by referendum — by majorities of 61% and 77%, respectively. In twenty-one of the states, the abortion statutes in effect in 1868 (the year the Fourteenth Amendment was ratified) were still effective at the time of the *Roe* decision. *Roe* 410 U.S. at 176, note 2 (dissenting opinion).

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40. Knecht, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*. 1972 U. of Ill. L.F. 177.

In sum, no state, including the four states which allowed abortion-on-demand, made abortion legal for the entire nine months. None of the states had abortion laws as expansive as that created by the Court in *Roe v. Wade*.

The amici respectfully submit that the protection of human life is the foremost duty of government. The Declaration of Independence asserts that all men are endowed with an inalienable right to life, and that it is in order to secure this right that governments are instituted among men. This principle is epitomized in the words of a Founding Father, Thomas Jefferson, who exhorted that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government".[41] Honoring this commitment, the Constitution provides in both the Fifth and Fourteenth Amendments that no person may be deprived of life without due process of law.

This Court, through its duty to interpret the law, should uphold this commitment to protect human life.

## II.

## THE FRAMERS OF THE CONSTITUTION AND OF THE FOURTEENTH AMENDMENT DID NOT INTEND TO CREATE A RIGHT TO ABORTION.

There is no ascertainable support in the legislative history of the Constitution to warrant the conclusion that it was intended to secure a "right to an abortion.[42] The Court's discussion of

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41. Speech to the Republican Citizens of Washington County, Maryland (March 31, 1809), reprinted in J. Bartlett, *Familiar Quotations*, 472-73 (14th ed. 1968).

42. Ely, *supra*, note 2, at 939.

the history of abortion regulation, *Roe*, 410 U.S. 113, 129-152, likewise offers no support for the finding within the Fourteenth Amendment of a right to abortion. Nevertheless, *Roe* declares that the Due Process Clause of the Fourteenth Amendment confers a right of privacy which includes the right of a woman to abort her offspring if she so chooses. The decision does not contain a comprehensive discussion of abortion and its relation to the right to privacy. Despite its confidence that somewhere in the Constitution there is a right to abortion, the Court is unwilling or unable to determine the boundaries of the privacy right, saying only that the Constitution does not confer "an un limited right to do with one's body as one pleases." *Roe*, 410 U.S. at 153. Yet if the right of privacy does not entitle one to do with one's own body what one pleases, how can it be extended to protect activity that terminates the life of what would certainly be another human being?

In the absence of an elaboration, it can be concluded that the Court felt that the *Roe* holding is sufficiently supported by the detriment imposed upon the pregnant woman by statutes which prohibit her from aborting her child. While the gravity of this detriment should be appropriately weighed, the Court obviously believes that other important factors, such as spousal consent, are not relevant. Even though the Court, in *Roe*, acknowledged that there is no unrestricted "right to privacy," *Roe* places no effective restrictions on a woman's right or ability to obtain an abortion under the privacy right. All this, however, has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.[43] Whatever one's viewpoint is on the abortion issue, it is generally agreed that the Constitution does not provide such an unrestrictive "right to privacy."[44]

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43. *Id.*, at 932.

44. *Id.*

## III.

## THERE IS NO BASIS FOR THE SUPREME COURT'S CONCLUSION IN *ROE* THAT PRENATAL LIFE IS BEYOND THE POWER OF THE STATE TO PROTECT.

The discussions in *Roe v. Wade* of the physiological and legal status of the fetus is the most crucial part of the opinion. The question of when life begins, the Court says, is beyond the competence of the judiciary to answer. *Roe,* 410 U.S. at 159. Nevertheless, the Court effectively answers that question for the legislatures and citizens of fifty states, declaring that the States may only protect unborn life after "viability." Therefore, human life, in the sense of an individual whose rights may be protected by the community, does not begin until at least the seventh month of pregnancy. Indeed, all existence prior to live birth is here given the status of, at most, "potential" life. *Doe v. Bolton* held that the "potential" life of even a viable unborn child cannot be regarded as comparable, under the law, to the emotional or social "health" of his or her mother. *Doe,* 410 U.S. at 192.

The Court offers two reasons for its deduction "that the word 'person' as used in the Fourteenth Amendment does not include the unborn": (1) that uses of "person" elsewhere in the Constitution do not have a prenatal application; *Roe*, 410 U.S. at 157, and (2) that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158.

The first reason is unpersuasive because in none of the clauses cited by the Court does the Constitution attempt to define what a "person" is. These provisions, which include the eligibility requirements for Federal office, the apportionment of representatives, the Extradition and Fugitive Slave Clauses of Article IV, act only to restrict a broad class of persons for

particular purposes. This is exemplified by the requirement that a person must be 25 to be a Representative, 30 to be a Senator and 35 to be President. These clauses, as Professor John D. Gorby of the John Marshall School of Law has explained, suggests "only that there are persons, 24 years of age and younger, who are not qualified for the House, Senate or Presidency."[45] They do not imply that those less than 24 years of age are non-persons, nor do they suggest when 24 year-olds become persons, or that they have become persons at birth or at any other particular stage of their development. The Court's essay on this subject offers little convincing proof to support its conclusion that "person" in the Fourteenth Amendment applies only post-natally.

The Court indicates that no case has specifically held the unborn to be persons under the Fourteenth Amendment. *Roe*, 410 U.S. at 158. Yet the Justices should have been aware that the question of the constitutional status of the unborn was before the Supreme Court for the first time. Thus, the Court was able to avoid addressing the issue of fetal personhood by citing a lack of controlling precedent. The failure to address the question more fully is difficult to understand if, as the Court opined, the appellant's case would collapse if the unborn were held to be persons.

Finally, there is ample reason to believe that the Court's belief in the relative availability of legal abortion during the 19th century is factually inaccurate. Leading authorities are in agreement that it was a common law crime to administer any drug or perform any operation for the purpose of causing a miscarriage, unless

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45. See Gorby, *The 'Right' To An Abortion, The Scope of the Fourteenth Amendment 'Personhood', and the Supreme Court's Birth Requirement*, 1979 So. Ill. L. Rev. 1, 11-12.

such operation were necessary to save the life of the woman.[46] During the 19th century, Americans gradually codified and strengthened the common law prohibition of abortion,[47] and as Justice Rehnquist noted in his dissenting opinion, at the time of the adoption of the Fourteenth Amendment in 1868, "there were at least 36 laws enacted by state or territorial legislatures limiting abortion." *Roe*, 410 U.S. at 174-176. At least 19 of these had been passed by 1850. Nevertheless, the Court "observ[ed] . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Roe*, 410 U.S. at 158.

The Court's holding that the Fourteenth Amendment could not possibly have been intended to protect the unborn may conflict with the plain meaning of the word "person," and quite possibly, with the intent of the Fourteenth Amendment. In order to decide whether an individual is protected under the Fourteenth Amendment, Congressman John Bingham of Ohio, its principal Framer, declared in 1867, "the only question to be asked of the creature claiming its protection is this: Is he a man?"[48] The Court's observations notwithstanding, this question has consistently been answered in the affirmative by American courts and legislatures with regard to the unborn.[49]

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46. R. Perkins, *Criminal Law* 140 (2nd ed., 1969) See generally, Horan et. al, *The Legal Case for the Unborn Child*, in *Abortion and Social Justice*, 105 (1972).

47. Destro, *supra*, note 29, 1278-80.

48. Cong. Globe, 40th Cong., 1st Sess. 542 (1867).

49. In 1850, the Supreme Court of Pennsylvania declared, "By the well settled and established doctrine of the common law, the civil rights of an infant en ventre sa mere are fully protected at all periods after conception." *Mills v. Commonwealth*, 13 Pa. 630, 631 (1850). See also *State v. Murphy*, 27 N.J.L. 112, 114 (1858) (the mother's offense in procuring an abortion "at the common is against the life of the child"); *Smith v. State*, 33 Me. 46 (1851).

Thus, the Court's finding of non-personhood of the unborn was a fleeting one. In any event, this finding does not mandate the Court's conclusion that the States lack any compelling interest in protecting the lives of these unborn.

The theme of "personhood" was further discussed by the Court in its observation that the unborn were not considered "persons in the whole sense" under the common law. *Roe*, 410 U.S. at 162. This observation is as tenuous as the Court's denial of personhood under the Constitution. The Court did not take note of the history of abortion restrictions in perspective—with abortion first as a violation of canon and common law, then, after the demise of canon law jurisdiction over civil matters,[50] as a common law crime, and as a statutory offense.

The phrase, "persons in the whole sense," is not inclusive. Many categories of human beings were not given full rights under the common law—for example, infants, women and slaves. Yet it does not follow that the common law did not protect the lives of these human beings. At common law, the unborn were the beneficiaries of personhood rights in some circumstances. For example, the Court acknowledged that unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians.[50]

In the realm of tort law, the uninterrupted trend of recent decades has been to discard the old rules and to allow the unborn child standing to sue for injuries sustained in utero. Dean Prosser has noted that,

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50. O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 Sup. Ct. Rev. 337, 355. See e.g. *Byrn v. New York City Health and Hospital Corp.*, 31 N.Y. 2d 194, 286 N.E. 2d 288, (1972).

> All writers who have discussed the problem have joined in condemning the old rule, and in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother.[51]

Thus, in terms of the law's development, the Court would have placed itself well within the mainstream by recognizing, under some circumstances, that the unborn have some type of "personhood" status. Instead, it did not even acknowledge this trend.

It is important to distinguish between *Roe v. Wade's* holding regarding the personhood of the unborn under the Fourteenth Amendment and the Court's subsequent discussion of theories on when life begins. On the first question, the Court squarely held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe*, 410 U.S. at 158. This conclusion disposed of any argument that the State might be permitted or obligated under the Amendment to protect the life of the unborn.

The second argument proposed by the State defendants in *Roe v. Wade* was that, apart from any duty under the Fourteenth Amendment, the State has a compelling interest in protecting life "from and after conception." *Roe*, 410 U.S. at 159. The Court's response was philosophical:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus the judiciary, at this point in the development of man's

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51. W. Prosser, *The Law of Torts*, 336 (4th ed. 1971)

knowledge, is not in a position to speculate as the the answer. *Id.*

After *Roe*, only one theory of prenatal life is reflected in American constitutional law: that life is worth protecting only after viability, when the fetus "has the capability of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. It is only at this point, fixed elsewhere in the opinion at about 24-28 weeks, *Id.* at 160, that a State may even begin to balance its interest in the life of the fetus against the social or emotional "well being" of the mother. This conclusion rests upon the Court's determination that until birth, "the fetus, at most, represents only the potentiality of life." *Id.* at 162. No other "theory of life," the Court holds, may be adopted by the states to limit the right to abortion. *Id.*

The Court examines the various historical views of when human life begins, and notes that many of these disagreed with the view that life begins at conception. *Roe,* at 160. In effect, the Court decided that the State may only enforce a theory of life that is consistent with the view that life begins at viability. The Court's determination, for purposes of the law, of when life begins and its division of the same in three fetal stages represents an arbitrary solution to implement a compromise to an uncompromisable situation. Again, regardless of one's views on the abortion issue, the Court's review of *Roe* cannot be characterized as mere interpretation of the Constitutional text.

## IV.

## THE SUPREME COURT, IN *ROE V. WADE*, EXCEEDED ITS SCOPE OF AUTHORITY WHEN IT CREATED A CONSTITUTIONAL RIGHT TO ABORTION.

There has been a great deal of jurisprudential criticism directed at the *Roe* and *Doe* decisions. Most of this criticism has

come from legal scholars who do not look with disfavor upon the substantive policies generated by these decisions. The question is how these results could emanate from and be mandated by a Constitution that had never been thought prior to 1973, to contain the "rights" set forth in *Roe* and *Doe*.

Among constitutional scholars who have been sharply critical of the jurisprudence in *Roe* are the late Alexander Bickel of the Yale Law School, Arthur Miller of the Harvard Law School, Harry Wellington, former Dean of the Yale Law School and Archibald Cox, former Solicitor General of the United States.[52]

*Roe*, like other controvertible Supreme Court decisions, reflects the anomaly of the American legal system. In an effort to account for some flexibility, the Court allowed for scientific advances so that later decisions could be adjusted accordingly. In spite of the plethora of medical and biological achievements in the twelve and a half years since *Roe*, the Court has not substantively altered its original holding. Nevertheless, the Court's decision can only be modified by self-initiative or by the long and arduous process of constitutional amendment. Consequently, *Roe* has attained a degree of permanency possibly not even envisioned by its authors.

The Court's division of the human gestational period into three trimesters is representative of *Roe's* arbitrary solution to the abortion rights question. The Court never substantiates its perceived need to dissect the State's interest to correspond with its three trimester formula. Despite the appearance of what some argue is an equitable balancing of rights and interests, the practical

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52. A. Bickel, *The Morality of Consent* (1975); A. Miller, *Miller's Court* (1982); Wellington, *Common Law Rules and Constitutional Double Standards*, 83 Yale L.J. 221, 303 (1973); A. Cox, *The Role of the Supreme Court in American Government* (1976).

result yields a nullity for an effective State interest. The Court ensured that most abortions could and would occur well before any meaningful application of State power. Certainly, even under the most liberal construction of jurisprudence, this amounts to a *non sequitur.*

## CONCLUSION

"Stare decisis et non quieta movere" — "to stand by what has been decided and not disturb what is at rest."[53]

This doctrine of *stare decisis* favors reliance on precedent and discourages overruling cases. However, incorrectly-decided constitutional questions are never quiet nor at rest. The landmark cases[54] which have been overturned were done so because their legal foundations were infirm. The Court has shown, in its jurisprudential wisdom, its willingness to reconsider the merits of earlier decisions based on new findings and unintended consequences of the original case.

*Roe v. Wade* is one such case ripe for reevaluation. Additional information is now available to the Court, not only through significant technological advances, but there is no evidence or indication that the *Roe* Court foresaw the occurrence of abortion on such a massive scale. This Court should not stand by what has been decided, for it was not correctly decided by jurisprudential standards, and as the issues in the matters subjudice indicate, there has been no rest for the *Roe* decision.

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53. See McKay, *Stability and Change in Constitutional Law*, 17 Vand. L. Rev. 203, 213 (1963). McKay renders "*quieta*" as "what is established." "What is at rest" seems to be more accurate.

54. For example, see *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lochner v. New York*, 198 U.S. 45 (1905).

Wherefore, the amici curiae pray that this Court reverses the Third Circuit Court of Appeals and reevaluates its original findings in *Roe*, for the reasons stated herein.

Respectfully submitted,

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** Counsel gratefully acknowledge the utility of the unpublished article of Horan and Balch, *Roe v. Wade: Its Facts and Logic Cannot Stand.*